

**DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 02-0428 CSET
CONTROLLED SUBSTANCE EXCISE TAX
FOR TAX PERIOD: 1996**

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ISSUE

1. Controlled Substance Excise Tax: Imposition

Authority: IC 6-7-3-5. IC 6-8.1-5-1 (b), Hurst v. Department of Revenue, 720 N.E.2d 370 (Ind. Tax. 1999), Hall v. Department of Revenue, 720 N.E.2d 1287 (Ind. Tax. 1999).

Taxpayer protests the imposition of the Controlled Substance Excise Tax.

Statement of Facts

As the result of a sting operation, the taxpayer was arrested on November 19, 1996 for possession of marijuana and cocaine. On April 12, 2002, the appropriate County Prosecuting Attorney sent the Indiana Department of Revenue, hereinafter referred to as the "department," a request for the assessment of controlled substance excise tax relating to the defendant's possession of marijuana. The department issued a Record of Jeopardy Finding, Jeopardy Assessment, Notice and Demand on May 9, 2002 in a base tax amount of \$15,339.45. The taxpayer filed a protest to the assessment. A hearing on the protest to the imposition of the controlled substance excise tax was held on October 23, 2002.

1. Controlled Substance Excise Tax: Imposition

Discussion

IC 6-7-3-5 imposes the Controlled Substance Excise Tax on the possession of marijuana in the State of Indiana. Departmental assessments are presumed to be correct and the taxpayer bears the burden of proving that an assessment is incorrect. IC 6-8.1-5-1 (b).

Possession of marijuana subject to the imposition of the tax can be either actual or constructive. Hurst v. Department of Revenue, 720 N.E.2d 370 (Ind. Tax. 1999), Hall v. Department of

Revenue, 720 N.E.2d 1287 (Ind. Tax 1999). Although both direct and circumstantial evidence may prove constructive possession, proof of presence in the vicinity of drugs, presence on property where drugs are located, or mere association with the possessor is not sufficient. Hurst at 374-375. To prove constructive possession, there must be a showing that Taxpayer had not only the requisite intent but also the capability to maintain dominion and control over the substance. Hurst at 374.

The issue to be determined in this case is whether or not Taxpayer had possession of the marijuana. The taxpayer contends that he never had actual or constructive possession of the marijuana because the marijuana was thrown in the back of his car and he was arrested before he ever had access to the marijuana. The taxpayer contends that since he was under arrest, he had no capability to maintain dominion and control over the marijuana.

The police officer's report and Affidavit For Probable Cause contradict the taxpayer's version of the transaction. The texts of these documents indicate that the taxpayer and confidential informant exchanged the marijuana for the money inside the taxpayer's house. When he was arrested, the taxpayer was holding a trash bag filled with the marijuana. After the taxpayer's arrest outside of his house, the police discovered the brown wrapping paper inside the defendant's residence. The taxpayer's transfer of the marijuana from the brown packaging paper to the trash bag and carrying the marijuana filled trash bag outside the house indicate that the taxpayer had actual possession of the marijuana.

The controlled substance excise tax was properly imposed on the taxpayer.

Finding

The taxpayer's protest is denied.